

NON-DISPARAGEMENT CLAUSES IN AN ONLINE WORLD: WHY BUSINESSES SHOULD BE FREE TO CONTRACT FOR SILENCE

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I. INTRODUCTION

“There are two ways of establishing a reputation, one to be praised by honest people and the other to be accused by rogues. It is best, however, to secure the first one, because it will always be accompanied by the latter.”¹

The long-term success of a business depends largely upon its reputation amongst existing and potential customers. A positive reputation for a business is as important as, and perhaps even more important than, any asset, innovation, or manager. This is because many customers perform some sort of research prior to making purchases. Whether getting advice on where to buy a car, which realtor is the most honest and effective in selling a home, or if a new restaurant has good service, customers are always seeking information to make sure that their time and money are well spent.

A positive reputation can drive sales more effectively than an expensive marketing campaign and can lead a business to financial stability and growth. A negative reputation is capable of being more harmful than many internal weaknesses or external threats, and can drive customer traffic in another direction. It is no wonder many businesses often take strong offensive and defensive measures to protect their reputations. It requires more effort to see why they must be allowed to do so.

Word-of-mouth communication, in a marketing sense, occurs when an existing or historic customer makes an oral or written communication to other potential customers regarding a business’s good or service.² A personal recommendation, whether good or bad, that travels by way of word-of-mouth has long been an important factor in determining whether a company will succeed or fail. In fact, it has been characterized by some people in the industry as “the most valuable form

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¹ CHARLES CALEB COLTON, LACON 113 (1837).

² *Word-of-Mouth Marketing*, BUSINESSDICTIONARY, <http://www.businessdictionary.com/definition/word-of-mouth-marketing.html> (last visited Mar. 27, 2015).

of marketing.”³

Typically, word-of-mouth communication becomes relevant in one of two general scenarios. In the first, customers in the market turn to sources of word-of-mouth communication when seeking information about a business.⁴ Rather than expressing an opinion about a good or service, the customers seek the opinion of others. These sources are commonly family, friends and neighbors.⁵

Word-of-mouth communication may also impact a business even if no one is seeking input regarding that business’s good or service. Customers that have dealt with a company and have gained a lasting impression may simply choose to express their experience through word-of-mouth communication to anyone who will listen. This communication will probably occur with the same sources from which suggestions and recommendations are usually sought; family and friends, who will carry the information forward to other people. Typically, when a customer has had a particularly good experience with a business, he or she is likely to report about it to at least one other person. At the very least, the business and experience will remain in the customer’s memory as a place to refer people in the future. On the other hand, when a customer has a bad experience, that too will become a story told to others, and will lead to recommendations away from the business.

With the emergence of the Internet and modern technological innovations, word-of-mouth communication has taken on new meaning and has gained new power in the marketplace. Information is now communicated almost instantly across large distances and vast areas with the click of a button or screen. This means that opinions that spread by word-of-mouth no longer reach just known acquaintances. Now these opinions, whether good or bad, can reach all members of the general public seeking an online review of a company and can impact their decision-making processes. This certainly presents many positive aspects, as people are able to express and share their thoughts and opinions with others.

However, this ability to express one’s self in such an unrestricted manner has led to some serious issues for businesses. Most importantly, when people receive information about a company’s product or services online, they are normally not in a position to effectively and accurately parse out valid information from improper opinion. Instead, an Internet

³ Kimberly A. Whitler, *Why Word Of Mouth Marketing Is The Most Important Social Media*, FORBES (July 17, 2014, 8:48 PM), <http://www.forbes.com/sites/kimberlywhitler/2014/07/17/why-word-of-mouth-marketing-is-the-most-important-social-media/>.

⁴ J-P De Clerck, *Understanding Word-of-Mouth in the Digital Age*, I-SCOOP, <http://www.i-scoop.eu/understanding-word-mouth-social-media-age/> (last visited Feb. 23, 2015).

⁵ *Id.*

user is able to read the posting of another person without questioning the motivation behind the posting or asking specific questions. Most likely, the two users communicating in that instance have not, nor ever will, meet. Despite the fact that the readers know they have never met the posters, they frequently assume that the person providing the information is doing so in an accurate and unbiased manner. This puts businesses at a disadvantage if they become the targets of inaccurate or malicious postings that negatively reflect upon their goods or services.

This Note addresses two ways that businesses have responded—not always morally—to negative customer reviews. In Part II, strategic litigation against public policy, known as SLAPP suits, are discussed briefly, however, non-disparagement clauses in consumer contracts are the main focus. Specifically, why businesses should be allowed to include them in contracts notwithstanding that such clauses may appear to be against public policy. Legislation has been passed at the state level and is pending at the federal level that is aimed at making the use of non-disparagement clauses in consumer contracts illegal. Parts III and IV address, however, why the emergence of social networking creates a need for non-disparagement clauses, especially among small businesses, and analyze the emerging trend toward prohibiting businesses from including non-disparagement clauses in their consumer contracts. Part V proposes different language for legislation to better balance the well-respected right of free speech with the need for small businesses to protect themselves.

II. BUSINESS RESPONSES TO NEGATIVE COMMENTS

A business has options when it comes to protecting its reputation from disparaging reviews advanced by disgruntled customers. Action can be taken on the back end of a transaction in the form of a defamation claim, or at the beginning as a non-disparagement clause. These two alternatives are discussed in detail below.

A. *SLAPP Suits*

Defamation claims create their own set of problems, as it can be difficult to tell whether a business is filing a legitimate claim, or has an ulterior motive. Historically, a lot of attention has been given to frivolous lawsuits filed by businesses and other public entities, which are designed to coerce people into keeping negative opinions to themselves.⁶ These types of suits came to be known as Strategic

⁶ Dwight H. Merriam & Jeffrey A. Benson, *Identifying and Beating a Strategic Lawsuit Against Public Participation*, 3 DUKE ENVTL. L. & POL'Y F., 17-36, 33 (1993).

Lawsuits Against Public Participation, or SLAPP suits.⁷ These suits were considered different from other lawsuits because they were meant to interfere with personal expression.⁸ SLAPP suits are especially troublesome because of the many forms they can take, ranging from attacks on constitutionally protected free speech to “more subtle attacks involving allegations of malicious prosecution or interference with business relationships.”⁹ While SLAPP suits are often associated with government issues they are common in business litigation as well. In order to curb frivolous litigation, many state legislatures (a little more than fifty percent) have passed anti-SLAPP laws aimed at penalizing businesses that attempt to quiet negative customer opinions through litigation.¹⁰

Times have changed since many of these issues first became relevant. The emergence of the Internet, and the access to information it provides to the everyday consumer, has brought a wealth of value. Unfortunately, it has brought a host of problems as well. Online forums and websites like Yelp have led to litigation resulting from online postings.

In one example from 2012, a homeowner named Jane Perez hired a contractor to perform some work on her house.¹¹ After the job was completed, she posted a negative review on Yelp criticizing the contractor, claiming that he had damaged her home and stolen her jewelry.¹² The contractor, Christopher Dietz, sued Perez for \$750,000 due to the damage to his reputation.¹³ Additionally, he filed a preliminary injunction to have the review removed from Yelp before a court could even determine whether it was true or false.¹⁴ The Fairfax County Circuit Court granted Dietz’s request for an injunction.¹⁵ This meant that Perez was potentially going to be forced to remove parts of her Yelp review.¹⁶ However, after an appeal, the Supreme Court of Virginia found that an adequate remedy was available at law, and reversed the lower court’s injunction.¹⁷

Generally, businesses can bring defamation actions for false or

⁷ Robert Abrams, *Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 33 (1989).

⁸ *Id.*

⁹ *Id.* at 33–34.

¹⁰ *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited Mar. 27, 2015).

¹¹ Adi Kamdar, *Amid Further Lawsuits, A Federal Anti-SLAPP Law Is Sorely Needed*, ELECTRONIC FRONTIER FOUND. (Jan. 9, 2013), <https://www.eff.org/deeplinks/2013/01/amid-further-lawsuits-federal-anti-slapp-law-sorely-needed>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Perez v. Dietz Dev.*, No. 122157, 2012 WL 6761997, at *1 (Vir., Dec. 28, 2012).

misleading online reviews. To prevail, four things must generally be shown. First, a false and defamatory statement of fact concerning the business must be made.¹⁸ Second, there must be an unprivileged publication of that statement to a third party.¹⁹ An unprivileged publication could include a posting to a public forum. Third, there is a *mens rea* component. There must be fault amounting to at least negligence on the part of the publisher.²⁰ Lastly, there must either be actionability of the statement irrespective of harm or the existence of special harm caused by the publication.²¹

SLAPP suits associated with postings on Internet forums, known as “cybersmear lawsuits,”²² are sometimes framed as “[t]hreats to individual privacy and speech online.”²³ However, one must ask what impact the Internet and individual statements have on the reputation, and therefore the livelihood, of a business. While websites like Yelp are often touted as public forums that exist for the greater good of allowing people to communicate openly, too often the focus is taken off of what is actually communicated. Certainly, a large percentage of what is posted on websites like Yelp is relatively accurate. But, what’s to keep a person from posting a negative review of a business that arises from a mistake, or even worse, is a flagrant lie? Therefore, shouldn’t businesses be able to protect themselves from online word-of-mouth reviews from customers that are false or overly harsh?

The answer, of course, seems to be yes. However, that creates a question of whether a suit filed against an online consumer for defamation has merit or is simply a SLAPP suit in disguise. Plus, with the cost and inherent uncertainty of litigation, it is expensive and difficult to predict how a court will decide these issues. Therefore, it has become necessary for businesses to find an alternate way of protecting their online reputations.

B. Non-Disparagement Clauses

Instead of responding to comments through litigation on the back-end of a transaction, some businesses have begun addressing the issue before the transaction even takes place. They do so by including a non-disparagement clause in the consumer contract. Disparage means “[t]o bring discredit or reproach upon; to dishonor, discredit; or to lower in

¹⁸ RESTATEMENT (SECOND) OF TORTS § 558 (1977).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Joshua R. Furman, Comment, *Cybersmear of Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 SEATTLE U. L. REV. 213, 214 (2001).

²³ *Id.*

credit or esteem.”²⁴ The clauses are commonly found in employment contracts. Companies frequently prohibit their employees from posting disparaging statements on forums like Facebook. Now, businesses have begun including the clauses in consumer contracts as a way of litigating a negative customer review, instead of filing a defamation suit.

Facially, this seems to be a more “moral” alternative to a defamation suit. First, customers at least assent to non-disparagement clauses at the time of contracting. Therefore, they are put on notice of their rights and can conduct themselves accordingly. If customers do not like a non-disparagement clause in the contract they can always choose to bargain around it or simply not do business with the company. Second, the clause puts a business in a better position to respond in the event the customer breaches and speaks poorly about the business. A well-written contract will clearly define the rights and duties of the parties, and a breach of contract claim can be a more certain road to travel than a defamation suit. These are just a couple of the benefits of allowing businesses to use contract law, rather than tort law in the form of defamation suits, when there is a disagreement regarding a customer’s reviews.

The federal and state legislatures have begun passing legislation prohibiting the use of non-disparagement clauses. Supporters of the new legislation claim that non-disparagement clauses are a violation of public policy. A promise or other term of an agreement is unenforceable on grounds of public policy if either legislation provides that it is unenforceable, or the interest in its enforcement is clearly outweighed by a public policy against enforcement.²⁵ In weighing a public policy against enforcement of a term, several factors are balanced such as:

- (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term?²⁶

This new tide of legislation is in response to situations that have arisen where consumers have been unfairly penalized by non-disparagement clauses. One of the more well-known instances involved

²⁴ *Disparage Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/54905?rskey=mlhgy9&result=2&isAdvanced=false#eid> (last visited Mar. 27, 2015).

²⁵ RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

²⁶ *Id.* § 178(3).

a Utah couple, a toy retailer, and \$20 worth of desk toys.²⁷ The problem began in 2008 when Jennifer Palmer ordered two toys for her husband, John, as Christmas gifts from KlearGear.com.²⁸ However, the goods never arrived after the order was placed. The couple contacted the company and was told that the order had been cancelled because the items had never been paid for.²⁹ PayPal had been used to purchase the items, but somehow the money was wired back into the couple's account without being forwarded to KlearGear.com.³⁰ The couple repeatedly tried to correct the situation by directly working with the company, things never got resolved.³¹ Then, in February 2009, Mrs. Palmer posted a review on ripoffreport.com criticizing the company and its customer service.³²

Three years after the negative review was placed online, Mr. Palmer received an email from KlearGear.com demanding that the review be deleted from ripoffreport.com within 72 hours.³³ Otherwise, he would have to pay \$3,500 for violating the company's non-disparagement clause.³⁴ KlearGear.com's non-disparagement clause stated that "[y]our acceptance of this sales contract prohibits you from taking any action that negatively impacts KlearGear.com."³⁵ According to the couple, the non-disparagement clause was added after they had purchased the items.³⁶

After receiving the email, the couple contacted ripoffreport.com and made attempts to take down their online review.³⁷ However, in order to have the post removed, KlearGear.com would have to enter into an arbitration proceeding with ripoffreport.com.³⁸ This would have cost \$2,000, and KlearGear.com refused anyway.³⁹ KlearGear.com wound up billing the couple \$3,500 for violating the company's non-disparagement clause.⁴⁰ The couple did not pay the fine, so KlearGear.com sent the account to collections, damaging the couple's

²⁷ Cyrus Farivar, *KlearGear Must Pay \$306,750 to Couple That Left Negative Review*, ARS TECHNICA, (June 25, 2014, 8:10 PM), <http://arstechnica.com/tech-policy/2014/06/kleargear-must-pay-306750-to-couple-that-left-negative-review/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Pamela Brown, *Couple Fined for Negative Online Review*, CNN, (Dec. 26, 2013, 9:32 AM), <http://www.cnn.com/2013/12/02/tech/couple-fined-for-negative-review/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Farivar, *supra* note 27.

credit.⁴¹

The Palmers filed suit in the United States District Court for the District of Utah, asking the judge to issue a declaratory judgment in their favor.⁴² They also wanted the judge to rule that Mr. Palmer had not agreed to the non-disparagement clause, and that it represented a violation of his First Amendment rights.⁴³ In April 2014, a federal judge ruled that: (1) Mr. Palmer did not owe KlearGear.com any money based on the non-disparagement clause or any money based on his failure to make any payment allegedly owing under that clause; (2) KlearGear.com was liable for violating the federal Fair Credit Reporting Act, defamation, intentional interference with prospective contractual relations, and intentional infliction of emotional distress; and (3) that the Palmers' reasonable attorney's fees could be paid.⁴⁴

As stated earlier, legislators have used situations like the one that arose out of Utah⁴⁵ as examples why non-disparagement clauses should be outlawed because of public policy. In certain instances, it seems as though the consumer had a legitimate grievance against a company and was penalized by an overly broad non-disparagement clause. It is these types of fact patterns, specifically, that have generated state and potential federal legislation making it unlawful for businesses to include non-disparagement clauses in their contracts.

1. California's Law

California Governor Jerry Brown signed one such non-disparagement law into effect on September 9, 2014.⁴⁶ Its legal title is AB 2365, but it has gained notoriety as the "Yelp Bill."⁴⁷ The bill was introduced due to the increase of non-disparagement clauses found in online clickwrap agreements.⁴⁸ It sought to accomplish two goals: (1) to protect consumers from unknowingly giving up their ability to report about their online retail experiences, and (2) to keep consumers from being "intimidated or penalized" for doing so.⁴⁹ The California bill's

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Order Entering Default Judgment at 1-2, John Palmer v. KlearGear.com, No. 1:13-cv-00175 (D. Utah. Apr. 30, 2014).

⁴⁵ See also Chris Welch, *This Hotel Charges Newlyweds \$500 for Each Negative Review on Yelp*, VERGE, (Aug. 4, 2014, 10:08 AM), <http://www.theverge.com/2014/8/4/5966715/hotel-fines-newlyweds-500-for-negative-yelp-reviews> (discussing a hotel in Hudson, New York, that has threatened to charge newlyweds \$500 for any negative review made by them, or any of their party guests, on any social media site).

⁴⁶ A.B. 2365, 2013-2014 Leg., Reg. Sess. (Cal. 2014).

⁴⁷ SONGMEE L. CONNOLLY, FENWICK & WEST LLP, *LITIGATION ALERT: CALIFORNIA BANS NON-DISPARAGEMENT CLAUSES IN CONSUMER CONTRACTS 1* (Sept. 18, 2014).

⁴⁸ *Id.*

⁴⁹ *Id.*

analysis cited the experience the Palmers had with KlearGear.com.⁵⁰ To date, there has not been a known decision in California addressing the presence of non-disparagement clauses in contracts; the law was intended to shut the door on the open question of whether such clauses are valid under California law.⁵¹

The law states that “a contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.”⁵² The California legislature determined that a provision waiving such consumer rights was contrary to public policy, and thus void and unenforceable.⁵³ A business that violates the law will be subject to a penalty up to \$2,500 for the first violation, and \$5,000 for the second and subsequent violations.⁵⁴ A consumer may bring a civil action against a business for violating the law.⁵⁵ Likewise, the California Attorney General, or the district attorney of the county or city in which the violation occurred, may bring an action as well.⁵⁶

The law has no geographic limitations and applies to any entity or person that does business in California.⁵⁷ Therefore, even if a business operates outside the state of California, it should ensure compliance with the statute or risk facing the penalties if it has customers within the state.⁵⁸

Adding to the impact of the law, looming ambiguities exist in how it is going to be applied. For example, will a non-disparagement clause in a contract be considered one violation of the law, or will there be multiple violations if several customers agree to the contract with the clause?⁵⁹ Also, the bill prohibits a business from “otherwise penaliz[ing]” a consumer for making a protected statement.⁶⁰ However, the bill does not explain what business actions may constitute a penalty. Lastly, the statute covers “any” statement protected by the statute without creating a condition that the statement must be truthful.⁶¹ Therefore, a customer could make a false statement about a business’s good or service, be sued for defamation by the business, and then file a cross-claim against the business for a violation of the Yelp law because

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² CAL. CIV. CODE § 1670.8(a)(1) (West 2014).

⁵³ *Id.* § 1670.8(b).

⁵⁴ *Id.*

⁵⁵ *Id.* § 1670.8(c).

⁵⁶ *Id.*

⁵⁷ CONNOLLY, *supra* note 47.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2.

⁶¹ *Id.*

the defamation suit penalizes the customer.⁶²

Businesses are not completely helpless under the new law and can take certain steps to avoid violations. First, they should review the terms and conditions of all of their contracts to ensure they do not contain any non-disparagement clauses.⁶³ Second, any existing contracts containing non-disparagement clauses should be revised and amended, with the updated terms provided to the customers.⁶⁴ Third, businesses should not try to contract around the law because the statute states that any waiver of its provisions is “contrary to public policy,” and “void and unenforceable.”⁶⁵ Lastly, businesses must be careful in how they respond to consumer statements because adverse actions may be viewed as “penalizing” the customer and potentially subject to liability under the new law.⁶⁶

There are also actions that businesses can take to respond to negative online reviews posted by consumers. For example, a business may still bring claims against consumers for defamatory statements.⁶⁷ But, as discussed earlier, there is an open question as to whether such claims would be a “penalty” under the statute.⁶⁸ Also, businesses may appeal directly to third party websites containing a customer’s unlawful statements to have them removed.⁶⁹ Lastly, businesses are always free to respond to a customer’s negative review with their own statements in online forums.⁷⁰

2. Proposed Federal Law

Rep. Eric Swalwell of California introduced H.R. 5499 in September 2014.⁷¹ It is titled the Consumer Review Freedom Act of 2014, and it contains terms similar to the recently passed California legislation.⁷² According to Swalwell, “[n]o country that values free speech would allow customers to be penalized for writing an honest review . . . I introduced [the] legislation . . . so people can share honest reviews without fear of litigation....”⁷³ Like the Yelp Bill, the legislation

⁶² *See Id.*

⁶³ *See Id.*

⁶⁴ *See Id.*

⁶⁵ *See Id.*

⁶⁶ *See Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ H.R. 5499 - Consumer Review Freedom Act of 2014, CONGRESS, <https://www.congress.gov/bill/113th-congress/house-bill/5499> (last visited Mar. 27, 2015).

⁷² *Id.*

⁷³ Press Release, Eric Swalwell, Congressman, U.S. House of Representatives, Bill Would Stop Businesses from Retaliating Against Consumers Who Write Negative Online Reviews (Sept. 16, 2014) (internal quotations marks omitted).

would make non-disparagement clauses in consumer contracts unenforceable.⁷⁴ Additionally, it would provide the Federal Trade Commission and state attorneys with the authority to take action against businesses that include the clauses in their contracts.⁷⁵

The bill states that:

A provision of a form contract is void from the inception of such contract if said provision— (1) prohibits or restricts the ability of a person who is a party to the form contract to engage in a covered communication; (2) imposes a penalty or fee against a person who is a party to the form contract for engaging in a covered communication; or (3) assigns or provides an exclusive license, or requires a person who is a party to the form contract to assign or provide an exclusive license, to any business, other person, or entity any intellectual property rights that such party to the form contract has or may have in a covered communication.⁷⁶

The bill would make it unlawful for a business to offer or enter into a form contract containing a non-disparagement provision,⁷⁷ and any violation would be considered a violation under the section of the Federal Trade Commission Act (15 U.S.C. § 57a(a)(1)(B)) regarding unfair or deceptive acts or practices.⁷⁸ Any person that would violate that section, or a regulation promulgated under that section, would be subject to the terms (penalties, immunities, and privileges) provided in the Federal Trade Commission Act.⁷⁹

As in the California Yelp Bill, the Consumer Review Freedom Act would give power to each state's Attorney General to enforce its provisions.⁸⁰ The law would apply to any legal entity organized to accomplish a business purpose, including both for-profit and not-for-profit enterprises.⁸¹ The Act is meant to provide protection to a person's written, verbal, or pictorial review, performance assessment of, or other similar analysis of, the products, services, or conduct of a business which is a party to a form contract⁸²—with the terms written, verbal, and pictorial including words, speech, pictures, photographs, and video

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Consumer Review Freedom Act of 2014, H.R. 5499, 113th Cong. § 2(a) (2014).

⁷⁷ *Id.* § 2(d).

⁷⁸ *Id.* § 2(e)(1).

⁷⁹ *Id.* § 2(e)(2).

⁸⁰ *Id.* § 2(f).

⁸¹ *Id.* § 2(g)(2).

⁸² *Id.* § 2(g)(4).

provided by electronic means.⁸³

With these new laws enacted and proposed, along with the threats of defamation litigation on the backside, the ability of companies to respond to and protect themselves against malicious online reviews is being eroded. As discussed, there are alternative ways for companies to respond to negative reviews, but none really go to the lengths provided by a non-disparagement clause. Given the unique features of the Internet and the harm that can be caused by disgruntled or anonymous posters, businesses should have the right to prohibit consumers from posting negative reviews online, at least under certain conditions.

III. INTERNET COMMENTING AND ITS POTENTIAL EFFECTS ON BUSINESSES

The Internet has profoundly impacted society since becoming a mainstream technology accessible to the average consumer. Nowadays, a seemingly infinite amount of information is available to anyone that chooses to seek it out. Entire encyclopedias can be searched in fractions of a second and people can order items for shipment from any point in the world. Along with all these functions, the rise of social media on the Internet has taken ahold of the public as well.

A. Types of Social Media

Social media refers to the methods and means available to people to create, share, and/or exchange information and ideas in online forums.⁸⁴ It is “a catch phrase that describes technology that facilitates interactive information, user-created content and collaboration.”⁸⁵ Popular Social Media tools and platforms include: blogs, a place for casual discussions regarding a specific topic; Facebook, the world’s largest social network, with more than 1.32 billion members as of June 2014; Twitter, a social networking/micro-blogging platform that allows groups and individuals to connect via short status messages; YouTube & Vimeo, video hosting and watching websites; Flickr, a photo sharing site; Instagram, a free photo and video sharing app that allows users to filter their photos; and LinkedIn, a place where professionals with similar areas of interest can share information and participate in conversations.⁸⁶

One of the most relevant social media sites for businesses is Yelp.

⁸³ *Id.* § 2(g)(4)-(5).

⁸⁴ *Social Media Overview: What is Social Media*, TUFTS UNIV., <http://webcomm.tufts.edu/social-media-overview13/> (last visited Mar. 27, 2015).

⁸⁵ Carolyn Elefant, *The “Power” of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 4 (2011).

⁸⁶ *Id.* at 4–5.

Yelp was founded in 2004 to help potential customers find local businesses for everyday needs (e.g. dentists, hair stylists, and mechanics).⁸⁷ The site allows users to post reviews of companies in the area that can be seen by other people in the area. In the fourth quarter of 2014, the site had an average of 135 million monthly unique visitors.⁸⁸ In total, people who post on the site, known as “Yelpers,” have written over seventy-one million local reviews.⁸⁹ The site allows any business owner or manager to set up a free account to post photos and messages to their customers,⁹⁰ and generates revenue by selling ads to local businesses in a given area.⁹¹

B. Individual Use of Social Media

Social media sites like Facebook and Yelp have really been embraced by people from all walks of life. Young adult Internet users between the ages of eighteen and twenty-nine are the predominant users of social networking sites.⁹² According to one survey, eighty-six percent of people in that age range say that they use social networking sites.⁹³ While the “younger generations” may be the heaviest users of social media sites, the strongest growth has been amongst older users.⁹⁴ Between April 2009 and May 2010, Internet users who say they use sites like Facebook or LinkedIn grew eighty-eight percent between the ages of fifty and sixty-four.⁹⁵ Internet users sixty-five-years-old and older saw an increase of one hundred percent.⁹⁶ By comparison, users in the age group of eighteen to twenty-nine only grew by thirteen percent.⁹⁷

These statistics show that much more than just a casual interest in social networking sites exists in the general public. Using social networking services to share status updates has also grown among older users.⁹⁸ While just five percent of fifty to sixty-four-year-old users say that they used a status update service like Twitter in 2009; eleven percent now say that they use these sites.⁹⁹ Plus, six percent of online adults ages fifty to sixty-four say that Twitter is now part of their daily

⁸⁷ *About Us*, YELP, <http://www.yelp.com/about> (last visited Mar. 27, 2015).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² MARY MADDEN, PEW RES. CTR., *OLDER ADULTS AND SOCIAL MEDIA*, PEW RESEARCH CENTER 2 (2010).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 3.

⁹⁹ *Id.*

routine, an increase from one percent in 2009.¹⁰⁰ A recent Nielsen report showed that Internet users spend about twenty-three percent of their time online using social media applications.¹⁰¹ If the amount of time the United States spent on the Internet were condensed to one hour, more than thirteen minutes would be attributable to social networks.¹⁰²

Internet users are also starting to share brand, product, and company preferences.¹⁰³ About twenty-five percent of users talk about their dissatisfaction with companies,¹⁰⁴ and almost the same amount use the Internet to talk about brands or products they like.¹⁰⁵ Plus, approximately one-third indicate that social media provides a forum to openly express opinions about a company, brand, or product.¹⁰⁶ However, for businesses, it's not just *what* people are sharing about themselves; it's *why* they are sharing.¹⁰⁷ Almost forty percent of users say they post online to influence the opinions of others.¹⁰⁸

The people posting reviews online have others listening too. Almost fifty percent of Americans who use social media say reviews about a particular company, brand, or product from people they follow on social networking websites influence their opinions.¹⁰⁹ In fact, the percentage is almost equal to the number of Americans who say reviews in print mediums influence them.¹¹⁰

C. Business Use of Social Media

Teenagers and grandparents are not the only people increasing their use of the Internet. Research gathered from LinkedIn found that a large majority of small and medium-sized businesses utilize social media as a means for growth.¹¹¹ According to the research, approximately eighty-one percent of small and medium-sized businesses are using social media in one way or another.¹¹² And, out of those that

¹⁰⁰ *Id.*

¹⁰¹ Mark Walsh, *comScore: Facebook Takes Lead In Time Spent*, MEDIAPOST (Sept. 9, 2010, 6:32 PM), <http://www.mediapost.com/publications/article/135476/comscore-facebook-takes-lead-in-time-spent.html>.

¹⁰² *Id.*

¹⁰³ Whitney Heckathorne, *Speak Now or Forever Hold Your Tweets*, HARRIS INTERACTIVE (June 3, 2010), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/403/ctl/ReadCustom%20Default/Default.aspx>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Kurt Wagner, *LinkedIn: 81% of Small and Medium-Sized Businesses Use Social Media*, MASHABLE, (Feb. 13, 2014), <http://mashable.com/2014/02/13/linkedin-social-media-study/>.

¹¹² *Id.*

are using Social Media, ninety-four percent are doing so to market to their customers.¹¹³ The use of social media is especially important to companies that are considered “hyper growth.”¹¹⁴ A hyper growth company is one that self-reported “significant” revenue growth year over year.¹¹⁵ According to the hyper growth companies, social media has specifically helped them increase brand awareness and find new customer leads.¹¹⁶

As the research shows, the number of people currently using social media as a means to communicate with others is extremely large. What’s more, the number of Baby Boomers’ that use social media is growing at a rapid pace. This has led to an increase in consumers turning to social media for business recommendations. Consumers are even increasingly using peer reviews to make decisions about small, everyday transactions, like where to eat a meal; making a good rating on sites like Yelp essential for small businesses.¹¹⁷ It is no wonder why businesses feel the need to invest time, money, and manpower into maintaining an online presence to make a connection with their potential customers. Many of these businesses feel, and the data seems to show, a positive social media presence is crucial if a company wants to get a customer’s attention online.¹¹⁸ Even utility companies have begun using social media as a means of developing strong relationships with customers.¹¹⁹

IV. THE UGLY SIDE OF SOCIAL MEDIA

The purpose of any social media site is to facilitate communication and discussions amongst members of the online community. Getting website users to comment and become involved in online discussions is one of the best ways for social networking sites to keep them coming back.¹²⁰ However, when a comment board is opened up to commenters, many successful websites with engaged users are faced with a struggle of facilitating an effective discussion while silencing troublemakers in the group.¹²¹

“Troll” is a slang term used to describe an individual that uses the anonymity of the Internet to post controversial comments based in

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Andrew Bluebond, Note, *When the Consumer is Wrong: Defamation, Interactive Websites, and Immunity*, 33 REV. LITIG. 679, 682 (2014).

¹¹⁸ See generally Elefant, *supra* note 85.

¹¹⁹ *Id.* at 5.

¹²⁰ Michelle L. Cramer, *Building Engagement and Community in the Age of Trolls*, ECONTENT, (Apr. 8, 2013), <http://www.econtentmag.com/Articles/News/News-Feature/Building-Engagement-and-Community-in-the-Age-of-Trolls-88714.htm>.

¹²¹ *Id.*

“racism, hatred, bigotry, or anything else that may coax online bickering among fellow commenters.”¹²² The intent behind a troll’s comments may be anything from attempting to get a reaction out of other readers, to a more malicious motive.¹²³ Online social networks provide an opportunity that few trolls can resist—a chance to provoke at least one emotional response and, perhaps, to wage a form of “cyber war.”¹²⁴

Trolls can have especially damaging effects on companies. As discussed earlier, more and more people, and hence more and more consumers, are turning to the Internet to gather information and seek advice. If a troll decides to target a particular business and begins posting malicious and misleading reviews on social media, it can be difficult, and perhaps impossible, for other users to realize that the reviews of the business are not accurate. Therefore, a potential customer may see a post criticizing a business that is completely untrue or over exaggerated, only to take it as fact and decide accordingly.

Not all online reviews are made in open forums. In the business context, there are sources of information that can be trusted to give a relatively unbiased point of view on a product or a service. ConsumerReports.org, for example, shows rates and reviews for products ranging from cars, to appliances, to electronics and other things.¹²⁵ There are several important differences between the reviews a person may find on ConsumerReports.org versus sites like Yelp. First, ConsumerReports.org rates and reviews products, not businesses.¹²⁶ Therefore, its comments are automatically limited in scope to a specific product. For example, if ConsumerReports.org tests and reviews a car manufactured by ABC Automotive, it may determine that the vehicle deserves a low quality rating. However, the site will not use the results of product testing to determine that ABC Automotive is not a good company. Indeed, a “good” company can create a “bad” product. Just as a “bad” company can create a “good” product.

Second, ConsumerReports.org and similar sites do not review anonymously.¹²⁷ Because they must “own” and, therefore, be accountable for their comments and reviews, a professional company or organization like ConsumerReports.org will be more cautious about what they say and how they say it. This is because their reputation is on the line and their judgment also reflects upon them directly.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *About Us*, CONSUMER REPORTS, <http://www.consumerreports.org/cro/about-us/index.htm> (last visited Mar. 27, 2015).

¹²⁶ *Id.*

¹²⁷ *See, e.g., How It Works*, Angie’s List, <http://www.angieslist.com/how-it-works.htm> (last visited Mar. 27, 2015) (heralding lack of anonymous reviews, something free review sites do not offer).

Third, ConsumerReports.org and similar sites are knowledgeable regarding the products they are testing.¹²⁸ Some products and services require a certain level of competency by the end user. A reviewer can rest assured that if the engineers at the testing facility say that a product didn't work, it was not likely to be the result of some sort of user error.

In contrast to these three things, social media sites provide trolls, or even just consumers in general, the opportunity to do the exact opposite. First, a site like Yelp allows the commenter to post reviews that expand beyond the scope of what he purchased. As an example, suppose a consumer buys a washing machine from a local hardware store. After taking the new machine home the consumer cannot get it to work properly. If the consumer chooses to go online and post negative reviews, those reviews could focus on one, or more, of three different areas. First, the consumer could focus on the specific model of the washing machine and say that it didn't work, wasn't reliable, etc. That statement is not *necessarily* accurate and could be questionable for matters that will be raised shortly. Next, the consumer could focus on the machine manufacturer, and report that the company does not produce any quality goods whatsoever. This statement is much broader than it should be and is likely to be less accurate. A large assumption has to be made in order to say that all of the products that a company manufactures are defective simply because the one used by the consumer failed to work. Finally, the customer may not focus on the machine or its manufacturer at all in its reviews. Instead, it may focus on the retailer and report that hardware store only sells faulty items. This review may be the least accurate of all—how can the merchandiser be aware of the quality of every single product that goes out of its doors? However, this type of review is not necessarily unreasonable to be seen in an online forum.

Second, opposed to the accountability a site like ConsumerReports.org faces, social media tends to allow for anonymous postings. Even if consumers must create an account in order to post a comment, there are plenty of opportunities for people to conceal their true identities. "Text-based interactions" allow for social networking users to conceal their true "[g]ender, [ethnic] background, socioeconomic status, geographic location, and marital status."¹²⁹ Online "handles" are occasionally used to alter one's presence via misleading descriptions, such as "Rambo" for a petite woman or "Single Lady" for

¹²⁸ See *About Us: How We Test: Appliances & Home Products*, Consumer Reports, <http://www.consumerreports.org/cro/about-us/whats-behind-the-ratings/testing/appliances-home/index.htm> (last visited Mar. 27, 2015).

¹²⁹ Kimberly S. Young and Robert C. Rodgers, Paper Presentation at the 69th Annual Meeting of the Eastern Psychological Association, *Internet Addiction to Development: Personality Traits Associated with Its Development* 4 (Apr. 1998).

a married man.¹³⁰ If a person has a bad experience with a company and can post about it anonymously, he may be inclined to over-respond, knowing that there is no way that the business or anyone else will be able to find the true identity of the poster. While it is outside the scope of this article, anonymity can play a large role in how people behave.

This type of behavior has led to real consequences for real companies. A marketing consultant in Missouri was contacted by a business whose online reputation was being attacked by trolls.¹³¹ According to the consultant, a business transaction that had not gone well left a group of customers very displeased.¹³² Afterwards, this group of customers followed the business's social media accounts and posted negative comments all over its web page.¹³³ Despite attempts to block them, the only result that proved effective was to shut down the online presence completely and start all over.¹³⁴ All in all, it took about four months for the business to repair its reputation.¹³⁵

Lastly, contrary to the adage, consumers are not always right and do not always know what they are doing. Take the consumer that purchases the washing machine. What if he is unfamiliar with the controls, puts too much soap or detergent in, or makes some other error on his part that causes the machine to work improperly? This could lead to the whole basis for his complaint to be misplaced on the product, manufacturer, or merchandiser when it was the customer's own inaptness that caused the problem.

V. PROPOSED LANGUAGE FOR NON-DISPARAGEMENT LEGISLATION

The Yelp Bill passed in California and the Consumer Review Freedom Act pending in the United States House of Representatives both have language that is too broad in scope. Instead of such a broad and all-encompassing language disallowing non-disparagement clauses completely, the non-disparagement statutes should at least allow for conditional non-disparagement clauses.

For example, a consumer contract could include a provision stating that a buyer may not disparage the seller in an online forum, unless the seller has an opportunity to cure the problem and fails to either remedy the problem or offer another reasonable solution. This approach gives the seller the opportunity to correct an issue before it is broadcast to the world at large.

Alternatively, a seller could be able to include a provision that a

¹³⁰ *Id.*

¹³¹ Cramer, *supra* note 120.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

buyer is not allowed to disparage the seller until after a small period of time (perhaps, thirty days) after the transaction is complete. This would allow for a “cooling off” period when the buyer can reflect about anything he or she may post online. Not only could this allowance lead to a more rational posting after inflamed tensions have settled, but it may also lead to a decrease in posts that negatively reflect on the company at large.

Lastly, a seller could include a provision that a buyer is not allowed to post any reviews anonymously. This would result in commenters “owning” their words, thereby reducing the level of trolling that takes place. If consumers must be associated with what they say, any negative reviews would likely be more rational and less seething. Whether this is a practical solution, given the technological prowess of many Internet users, is a discussion for another article.

VI. CONCLUSION

Free-speech concerns are naturally going to arise when a business attempts to exert control over what its customers may say after a transaction. However, two main things must be remembered in regards to that point. First, the First Amendment, and therefore free speech in the constitutional context, only protects against interference from the government,¹³⁶ and a non-disparagement clause is very different. In order for consumers to be subject to the non-disparagement clause, they must willingly enter into a contract. And, when people willingly enter into contracts, they are generally accountable for all included terms. Furthermore, at least one state has clearly recognized that private businesses have the right to restrict the speech of their employees.¹³⁷ Second, people should be able to bargain when they enter into a contract. Therefore, businesses should be free to bargain for the silence of their customers, at least to a limited extent in certain contexts.

Ultimately, legislation restricting the use of non-disparagement clauses requires a result that balances these two important interests. On one hand, there is the inherent right for consumers to be free to describe their experiences with certain sellers. Indeed, this ability to share

¹³⁶ See *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976) (“It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.” (internal citations omitted)).

¹³⁷ See *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1357 (Ill. 1985) (“There is nothing in either the Illinois Constitution or the Illinois Human Rights Act to mandate the inclusion of the right of free speech into those rights which are applicable to the employer-employee relationship.”).

experiences is socially desirable because it allows for other consumers to become aware of “good” and “bad” businesses. This serves the interests of other consumers by preventing them from entering into transactions with those businesses that might deserve a bad reputation. On the other hand, businesses heavily rely on their reputation to drive consumers to their goods and services. A single customer, with a single isolated and bad experience, could use social networks to cause a tremendous amount of problems for a business.

Admittedly, coming up with a resolution that serves both interests is difficult. But, negative reviews can be especially troublesome for smaller, lower-volume sellers. If a consumer turns to Yelp and posts a negative review about a product that he ordered from a Fortune 1000 company, the effects of that single review will not be noticeable on the bottom line of the corporation’s local business unit, let alone the company as a whole. But, for a local small business with much lower annual sales and profit margins, the loss of revenue from a single negative online review can mean big problems. It is for this reason that legislatures should not completely shut the door on non-disparagement clauses. Instead, businesses should be allowed to contract for what may be the most valuable thing they own: their reputation.